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In The

SUPREME COURT OF THE UNITED STATES

No. 71-249

THOMAS JUSTIN ORR,

Petitioner,

v.

RAYMOND E. TRINTER, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE AND MEMORANDUM OF THE BOARD OF EDUCATION OF THE CITY OF WASHINGTON C. H., OHIO AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes the Board of Education of the City of Washington C. H., Ohio and respectfully moves this Court, pursuant to Rule 42, paragraph 3, of the Rules of this Court, for leave to file the accompanying memorandum as amicus curiae in support of the respondents.

The interest of the Board of Education of the City of Washington C. H., Ohio, and its reasons for asking leave to file a memorandum as amicus curiae are set forth in the accompanying memorandum.

Respectfully submitted,

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September 15, 1971

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MEMORANDUM OF THE BOARD OF EDUCATION OF THE CITY OF WASHINGTON C. H., OHIO AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

The Board of Education of the City of Washington C. H., Ohio, upon motion, appears as amicus curiae in support of the respondents.

INTEREST OF THE BOARD OF EDUCATION OF THE CITY OF WASHINGTON C. H., OHIO, AS AMICUS CURIAE AND ITS REASONS FOR REQUESTING LEAVE TO FILE.

The Board of Education of the City of Washington C. H., Ohio, is the appellee in the United States Court of Appeals

for the Sixth Circuit in a companion case[1] involving basically identical facts as are presented herein. The outcome of this appeal will be dispositive of the Washington Court House case of a teacher whose limited contract was not renewed, and who was not offered a hearing for the purpose of showing cause why she should not be reemployed pursuant to the Ohio Revised Code.[2]

For the foregoing reasons, the Board of Education of the City of Washington C. H., Ohio, has requested leave of this Court to appear as amicus curiae in support of the respondents.

REASONS FOR DENYING THE WRIT

The Courts should not interfere with the statutory right of a board of education to enter into contracts of employment with teaching, supervisory or administrative personnel necessary to operate the several school systems throughout the State of Ohio.

The United States Court of Appeals for the Sixth Circuit, in reversing the District Court, affirmed the well established practice of the thousands of public schools and universities in this country, consisting of hundreds of thousands of faculty members and millions of students within their responsibility.

The legislature of the State of Ohio in its determination of the rights of a beginning teacher, afforded that teacher the protection of a limited contract which could be bargained for at arms length by the teacher with the board of education. Petitioner's right is purely contractual. Upon proven on-the-job ability and capabilities, the board, at its option, may employ that teacher with tenure. When

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[1] *Fannon* v. *Nestor, Board of Education of Washington C. H., Ohio, et al., Civil Action* 70-176 (Southern District of Ohio)

[2] Section 3319.11, Ohio Revised Code.

a teacher's requisite competence has so been determined and the teacher is hired with tenure, that teacher is afforded a security of employment far in excess of the average employee, professional, semi-professional, skilled or unskilled.

The petitioner would have this Honorable Court override the legislative authority of the several states who have seen fit to regulate the probationary apprenticeship observation period established through limited contract employment pursuant to statute.[3] Rather, the petitioner would presume to make the federal courts of this great country the final arbitrator for every civil servant and quasi civil servant who has an occupational grievance at the onset of his employment.

Your amicus curiae is not vested with the sophistication and wealth of the major educational powers that dominate the heavily populated areas of the midwestern states; we speak for a small, rural, peace loving and solvent community. The balancing test as set forth in *Cafeteria Workers v. McElroy,* 367 U.S. 886, dictates that the best interests of our boards of education, elected by their respective communities can best be served if not saddled with burdensome and multiplicious hearings to determine whether the limited contract of an apprentice should not be renewed. Would this not be even more applicable to the large metropolitan areas? Boards of Education are not legal tribunals.

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[3] Pursuant to statute, petitioner Orr was employed on a limited contract, which was for one school year. The contract expired. No expectancy of employment is offered or included in the limited contract. Petitioner was not discharged by the Board of Education. It does not appear in the stipulations of counsel at the original hearing (District Court) that Orr ever asked to stay in his position. Orr did not complain that his contract had not been renewed, as a result of the exercise of a constitutional right. Rather, he argues that failure to give notice of the reasons of contract non-renewal violates the Fourteenth Amendment. *Hopkins* v. *Wasson,* 329 F. 2d 67 (6th Cir.) Cert. Denied, 379 U.S. 854.

They are employers and when they decide to hire or not to hire, they are acting as proprietors. If the petitioner were to prevail and have the well established, traditional and statutory rights of the boards destroyed, that probationary period extended the teacher for the observation of his applied skill would no longer be probationary, and all teachers from the first day of their teaching careers would be permanent employees subject only to litigation. An individual does not have a constitutional right to employment. *Cafeteria Workers* v. *McElroy*, supra.[4]

Throughout the years, a system of limited contract employment, followed by the luxury of tenure, has been carefully refined and tested. The tenured teacher or professor, when tenured, can only be dismissed for "cause." The petitioner has attacked the built-in merit system existent in the limited contract and tenured system of employment. Competition is the determinative factor for quality and success. The merit system of the limited contract and tenure employment pattern is designed to reward the qualified teacher with the security of future employment but for severe malfeasance or misfeasance. The good, the average and the bad compete for the positions. The rewards go to the good. The destruction of the limited contract would remove this built-in safeguard which the legislature determined necessary in avoiding complete tenure employment. The General Assembly of the State of Ohio, through its elected members, saw fit to give the superintendent the right to recommend which teachers, having observed their performance, should be tenured.

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[4] Mr. Justice Brenen, in his dissent in *Nelson* v. *Los Angeles County*, 362 U.S. 1, at Pg. 16 stated:

> "Doubtless a probationary employee can be constitutionally discharged, without specification of reason at all, and this Court has not held that it would offend the due process clause, without more for a state to put its entire civil service on such basis, if as a matter of internal policy it could stand to do so."

Fairley v. *Board of Education*, 169 O.S. 388, 8 O.O. 2d, 417, 1959. But the safeguards as set forth in the limited contract tenure provisions of the code, are not safeguards solely for the benefit of the individual teacher. The safeguards are also for the benefit and protection of the children of this country, whom we entrust to the teachers in our public educational system.

CONCLUSION

In a case of this nature, there frequently exists an innocent and paralyzed victim incapable of self defense. In this case, for some reason, we have failed so far to hear the cries of the victims who must ultimately be the real parties in interest. We have set our sights on the wrong target. We are obsessed with the efforts of those who fail to meet the standards of their superintendents and boards of education who now seek to beat a workable and satisfactory system established by the elected members of the General Assembly of the State of Ohio and the several states. For thirteen of the first eighteen years of our children's lives, we entrust them for hours upon hours each week for their training and development to the teachers in their respective school systems. The judicial system is incapable and inequipped to become the final arbitrator in determining the quality and qualifications of those to whom we entrust our most precious possessions.

Respectfully submitted,

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Respondents.

SUPPLEMENTAL STATEMENT OF PETITIONER

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SUPPLEMENTAL STATEMENT OF PETITIONER

On August 18, 1971, we filed a petition for a Writ of Certiorari to the Sixth Circuit in the above-captioned case.

Basically, the issue involved is whether a public school may refuse to renew the contract of a non-tenured teacher without providing the teacher with a statement of the reasons for non-renewal and a hearing thereon. *One* of the reasons we urge for granting the Writ is the direct conflict, *inter alia,* between the Sixth Circuit's decision below and the Seventh Circuit's decision in *Roth* v. *Board of Regents,* No. 18490 (July 1, 1971) (see Petition, pp. 8-11). *Roth* involved the non-renewal of a public college teacher, and, although not relied upon by the Seventh Circuit, a claim by the teacher that his non-renewal resulted from his exercise of First Amendment rights.

On September 2, 1971, after the instant Petition was filed, the Seventh Circuit decided *Shirck* v. *Thomas*, No. 18790. The court held, citing its prior *Roth* decision, that due process required that a non-tenured public high school teacher be given a statement of reasons and a hearing thereon prior to non-renewal of her contract. The teacher in *Shirck* did not allege that her non-renewal was in any way related to her exercise of any substantive constitutional rights.

The *Shirck* decision places the Seventh Circuit even more directly in conflict with the Sixth Circuit's decision below, in that the instant case likewise involves the non-renewal of a public high school teacher, who, on the present state of the record, does not allege that his non-renewal was related to his exercise of constitutionally protected activity.

Respectfully submitted,

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